There exists side by side in the Code, as I have stated, sections 417 and 418A, both designed to achieve the same purpose in so far as it relates to the transfer to the High Court of criminal cases triable by a subordinate court, and I am accordingly constrained to conclude that section 418A of the Code violates Article 8(1) of the Constitution and must therefore be struck down as malignant in contrast with the benign provisions of section 417.

I therefore declare section 418A, as it is worded and as it now stands, unconstitutional and void by virtue of the provisions of Article 4(1) of the Constitution and equally so the certificates issued by the Public Prosecutor thereunder for the transfer of these cases to the High Court. The transfer effected thereby is accordingly of no effect.

Transmission to the High Court under the section 418A channel therefore fails but this is not necessarily the end of the matter, as an application by the Public Prosecutor for transmission under the section 417 channel is still open and available to him if he chooses to apply thereunder, in which event the court will consider the application within the ambit of that statutory provision and on its merits.

Order accordingly.

Solicitors: *R.R. Chelliah Bros.; Sri Ram, Chan & Chia; Adlan & Suhaimi; Joseph & Son; Dato' Rajasooria & Son; Kadir Kassim & Co.; Jag-Jit Singh & Co.*

PUBLIC PROSECUTOR v. OH KENG SENG

[O.Cr.J. (Ajaib Singh J.) August 17, 1976]
[Seremban — Criminal Trial No. 2 of 1976]

Criminal Law and Procedure — Transfer of case to High Court on certificates issued by Public Prosecutor under s. 418A of the Criminal Procedure Code (F.M.S. Cap. 6) — Whether valid — Whether s. 418A of the Criminal Procedure Code is in violation of art. 8(1) of the Federal Constitution — Whether transfer of case from Subordinate Court to High Court deprived the accused of the benefit of a preliminary enquiry — Whether accused has lost the right of appeal — Criminal Procedure Code (F.M.S. Cap. 6) ss. 417, 418 and 418A — Federal Constitution, arts. 4(1), 8(1) and 145(3).

In this case the accused was originally charged in the Sessions Court. The case was transferred to the High Court on certificates issued by the Public Prosecutor under the provisions of section 418A of the Criminal Procedure Code. Counsel for the accused contended that: (a) section 418A of the Criminal Procedure Code violated article 8(1) of the Federal Constitution and was therefore void and unconstitutional; (b) that by transferring the case from the Subordinate Court to the High Court the accused had been deprived of the benefit of a preliminary enquiry; and (c) that by transferring the case from the Subordinate Court to the High Court the accused lost the right of appeal.

Held: (1) section 418A of the Criminal Procedure Code is a valid law and it does not violate the provisions of article 8(1) of the Federal Constitution;

(2) the requirement as to the holding of a preliminary inquiry was specifically excluded when the Public Prosecutor invoked his powers under section 418A. All criminal trials which are heard in the subordinate courts are summary trials that is to say they are heard and determined by the court without holding a preliminary inquiry. The accused in this case had therefore not lost the benefit of a preliminary inquiry and he stood in no worse a position then any other person accused before the Subordinate Court;

(3) in this case the accused did not lose his right of appeal. As a matter of fact he was placed in an advantageous position for he could appeal to the Federal Court if he was convicted in the High Court whereas if his appeal from the lower court decision failed in the High Court that would be the end of the matter unless a certificate was issued by the High Court or by the Public Prosecutor on a point of law for the determination of the Federal Court;

(4) section 418A does not in any way discriminate against a particular offender or a particular offence. The section embraces all who appear before the subordinate courts charged with criminal offences.

Cases referred to:—

(1) *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.* [1976] 2 M.L.J. 116.

(2) *State of West Bengal* v. *Anwar Ali* A.I.R. 1952 S.C. 75.

RULING ON PRELIMINARY OBJECTION RAISED BY COUNSEL FOR ACCUSED.

Tan Sri Datuk Haji Mohamed Salleh bin Abas (Solicitor-General), *Azmel bin Haji Maamor* (Legal Adviser, Negri Sembilan) and *Razalli bin Hassan* (Deputy Public Prosecutor) for the Public Prosecutor.

Yeap Ghim Guan (*John Fernandez* with him) for the accused.

Ajaib Singh J.: The accused in this case is charged with uttering seditious words under section 4(1)(b) of the Sedition Act 1948 which is punishable with a fine not exceeding $5,000 or to imprisonment for a term not exceeding three years or with both such fine and imprisonment. The punishment for a subsequent offence is imprisonment for a term not exceeding five years. The accused was originally charged in the Sessions Court as his case fell within the criminal jurisdiction of the subordinate courts. However on March 3, 1976 the Attorney-General in his capacity as Public Prosecutor issued a certificate under the provisions of section 418A of the Criminal Procedure Code requiring the Sessions Court at Seremban where the accused was facing the charge to remove the case pending before that court to the High Court. The accused was accordingly brought and produced before this court for trial.

Before the commencement of the trial Mr. Yeap Ghim Guan for the accused raised a preliminary objection. He submitted that section 418A of the Criminal Procedure Code was *ultra vires* the Federal Constitution because it violated article 8(1) of the Constitution which provides that all persons are equal before the law and are entitled to the equal protection of the law. He submitted that the Constitution being the supreme law of the Federation as declared in article 4(1) any law passed after Merdeka Day which is inconsistent with the Constitution is void. This applied both to substantive and procedural laws. Mr. Yeap Ghim Guan contended that the powers given to the Public Prosecutor under section 418A were unrestricted and too wide. There was no control nor were there any guidelines for its exercise. No classification had been made under section 418A. The second ground for the objection taken by Mr. Yeap Ghim Guan was that by transferring the case from the subordinate court to the High Court the accused had been deprived of the benefit of a preliminary inquiry and this amounted to discrimination against the accused thereby violating the provisions of article 8. Thirdly it was submitted

that by transferring the case from the subordinate court to the High Court the accused lost the right of appeal which he would otherwise have had from the lower court to the High Court. Mr. Yeap Ghim Guan referred to a recent decision in a case heard in the High Court at Kuala Lumpur[1] where Abdoolcader J. upheld a similar objection by the defence on the validity of section 418A and ruled that it violated article 8(1) of the Constitution and was therefore null and void.

The Solicitor-General Tan Sri Mohamed Salleh bin Abas who led the prosecution submitted that section 418A was a valid law and did not contravene article 8(1) of the Constitution. First he said that it was important to consider the position of the Attorney-General in this country as compared with his counterpart in India and that the Indian decisions should be considered and analysed carefully before accepting them. Unlike the powers of the Attorney-General in India the Attorney-General in Malaysia is vested with extensive and wide powers under article 145(3) of the constitution whereby he has the power exercisable at his discretion to institute, conduct or discontinue criminal proceedings other than those before a Muslim court, a native court or a court-martial. The exercise of this discretion was in the nature of a judicial exercise and not an arbitrary exercise of his powers. It could not therefore be said that the exercise of his discretion under article 145(3) of the Constitution and section 418A of the Criminal Procedure Code violated article 8(1) of the Constitution. Secondly the Solicitor-General submitted that by the application of section 418A the position of the accused was not disadvantageous but was advantageous to him for he got the benefit of a trial in a superior court. Also the procedure relating to his trial would be the same and he would not be prejudiced in any way. Thirdly it was submitted by the Solicitor-General that the doctrine of classification was unjustified and artificial and he referred to the case of *State of West Bengal* v. *Anwar Ali*[2] where he said that the majority decision declared the law concerned in that case as *ex facie* unconstitutional and where the minority view held that the law was valid but its applicability was unconstitutional.

After giving due consideration to the submissions advanced on behalf of the parties and after considering the relevant legislation I have come to the conclusion that section 418A of the Criminal Procedure Code is a valid law and that it does not violate the provisions of article 8(1) of the Federal Constitution. The provisions relating to the transfer of criminal cases are set out in Chapter XLII of the Criminal Procedure Code which has three sections as follows:—

"417. (1) Whenever it is made to appear to the High Court —

(a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto; or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same; or

(d) that an order under this section will tend to the general convenience of the parties or witnesses; or

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

it may order —

(aa) that any offence be inquired into or tried by any court not empowered under sections 121 to 126 but in other respects competent to inquire into or try such offence; or

(bb) that any particular case or class of cases be transferred from a criminal court subordinate thereto to any other such criminal court of equal or superior jurisdiction; or

(cc) that any particular criminal case be transferred to and tried before the High Court; or

(dd) that an accused person be committed for trial before the High Court; or

(ee) that a person committed for trial in one place be tried in another place.

(2) The High Court may make an order under subsection (1) either on the report of the lower court, or on the application of the Public Prosecutor or the accused person, or on its own initiative.

(3) (a) When an order is made under paragraph (cc) of subsection (1) the lower Court before which the inquiry into, or the trial of, the offence against the accused person is pending shall,

(if the case is triable by the lower Court) without holding a preliminary inquiry under Chapter XVII; or

(if the case is triable by the High Court and the preliminary inquiry under Chapter XVII is in progress or has not yet commenced when the order is made) without holding or completing such preliminary inquiry,

cause the accused person to appear or be brought before the High Court on the date specified in the said order or as soon as may be practicable if no such date is specified.

(b) When the accused person appears or is brought before the High Court in accordance with paragraph (a), it shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

(4) The Court to which a case is transferred under this section may act on the evidence already recorded in an inquiry or a trial or partly so recorded and partly recorded by itself, or it may re-summon the witnesses and re-commence the inquiry or trial:

Provided that in any case so transferred the Public Prosecutor or the accused person may, when the Court to which the case is transferred commence its proceedings, apply that the witnesses or any of them be re-summoned and re-heard.

418. (i) Every application for the exercise of the power conferred by the last preceding section shall be made by motion which shall, except when the applicant is the Public Prosecutor, be supported by affidavit.

(ii) Every such application shall be made before the inquiry into or trial of the offence has been concluded.

(iii) When an accused person makes an application under this section, a judge may, if he thinks fit, direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the expenses of the prosecution.

(iv) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

418A. (1) Notwithstanding the provisions of section 417, the Public Prosecutor may in any particular case triable by a criminal court subordinate to the High Court issue a certificate requiring the court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court.

(2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally.

(3) Upon receipt of the certificate, the court before which the case is triable shall without holding a preliminary inquiry under Chapter XVII transmit the case to the High Court mentioned in the certificate and cause the accused person to appear or be brought before such High Court as soon as may be practicable; and thereafter the provisions of subsection 3(b) and subsection (4) of section 417 shall apply to such case *mutatis mutandis.*"

Article 4(1) of the Federal Constitution declares that the Constitution is the supreme law of the Federation and that any law passed after Merdeka Day which is inconsistent with the Constitution shall to the extent of the inconsistency be void. Under the fundamental liberties provisions of the Constitution it is provided in article 8(1) that all persons are equal before the law and entitled to the equal protection of the law. It need hardly be stressed that it is the duty of the court to jealously guard the Constitution and to see that nothing is enacted by the legislature which may offend the provisions of the Constitution particularly those which relate to the fundamental liberties of the subject. If any particular piece of legislation gives so much as a hint that it violates the Constitution the court must unhesitatingly declare it null and void and of no effect. On the other hand if the impugned legislation is not inconsistent with or does not in any way violate the Constitution it is equally the duty of the court to uphold its validity and give effect to it.

Before the court can declare that section 418A of the Criminal Procedure Code is unconstitutional on the ground that it violates article 8(1) of the Federal Constitution it must be satisfied how and in what manner would an accused person not be equal before the law and would not be entitled to the equal protection of the law by the operation of the provisions of section 418A of the Criminal Procedure Code. Section 418A gives power to the Public Prosecutor to issue a certificate in any criminal case triable by a court subordinate to the High Court requiring the subordinate court to remove the case to the High Court for trial and this power is exercisable by the Public Prosecutor personally and not by his deputies. I fail to see in what way can it be said that the exercise of the powers by the Public Prosecutor under section 418A renders an accused person against whom the section is invoked less equal before the law and disentitled to the equal protection of the law in relation to all other persons waiting trial in the subordinate courts. All persons facing criminal charges triable in the subordinate courts are liable to have their cases transferred to the High Court under section 418A which makes no discrimination against any particular offender or as to any particular offence. The Public Prosecutor has the discretion to decide which case he would have removed to the High Court and in the exercise of his discretion he may be guided by various considerations such as that some difficult point of law is involved in the case or as a matter of expediency. The legislature has given the powers under section 418A to the most high ranking law officer in the country to be exercised by him personally and it must be presumed that he would exercise his discretion fairly and in the best interests of justice. Therefore if the exercise of his powers under the section is to be challenged it must be shown to the satisfaction of the court that in exercising his powers the Public Prosecutor has acted in bad faith or that he has acted outside the scope of section 418A. Section 418A cannot be challenged as being *ultra vires* the Constitution.

On the point raised by Mr. Yeap Ghim Guan that by transferring the case from the lower court to the High Court the accused had lost his right to the benefit of a preliminary inquiry I must say with respect that there is no merit in this argument. Section 138 of the Criminal Procedure Code states that except as otherwise provided in Chapter XLII no person shall be tried before the High Court unless he shall have been committed for trial after a preliminary inquiry. It will be seen that both sections 417 and 418A which are in Chapter XLII provide *inter alia* for the transfer of any criminal case pending in the subordinate courts to the High Court for trial without holding a preliminary inquiry. The requirement as to the holding of a preliminary inquiry is thus specifically excluded when the Public Prosecutor invokes his powers under section 418A. The accused in this case has therefore not lost the benefit of a preliminary inquiry and he stands in no worse a position than any other person accused before a subordinate court. All criminal trials which are heard in the subordinate courts are summary trials that is to say they are heard and determined by the court without holding any preliminary inquiry. Therefore when the Public Prosecutor exercises his powers under section 418A of the Criminal Procedure Code an accused person does not lose any right to the benefit of a preliminary inquiry. He has no right to a preliminary inquiry if he is tried in the lower court and therefore he cannot lose any right which he does not have in the first place. And as I have mentioned earlier section 138 of the Criminal Procedure Code takes away the requirement of holding a preliminary inquiry where a case triable by the subordinate court is transferred to the High Court under section 417 or section 418A. The trial thus remains as a summary trial whether it is tried in the subordinate court or in the High Court.

The third point taken in the objection was that by transferring the case to the High Court the accused would lose one step in his appeal. If convicted in the lower court he could have appealed to the High Court and this right of appeal would be lost to him now. But the true position is that the accused does not lose his right of appeal. As a matter of fact he is placed in an advantageous position for he can appeal to the Federal Court if he is convicted in the High Court whereas if his appeal from the lower court decision fails in the High Court that would be the end of the matter unless a certificate is issued by the High Court or by the Public Prosecutor on a point of law for the determination of the Federal Court. On the question of classification a reasonable classification of offences or offenders is valid and does not violate article 8(1) of the Constitution. In the present case it seems to me that section 418A does not make a specific and limited classification of any offence or offenders. The classification is of all persons who are charged with any criminal offence triable in the subordinate courts. It follows therefore that section 418A does not in any way discriminate against a particular offender or a particular offence. The section embraces all those who appear before the subordinate courts charged with criminal offences.

In deciding on the constitutional validity or invalidity of section 418A of the Criminal Procedure Code article 145(3) of the Federal Constitution is wholly irrelevant and inapplicable. Article 145(3) empowers the Attorney-General to institute, conduct or discontinue any proceedings for an offence but the article has nothing to do with the transfer of criminal cases

from one court to another much less the giving of arbitrary powers to the Attorney-General in criminal matters which cannot be challenged as unconstitutional. Section 418A has to be tested by its own strength against the provisions of articles 4(1) and 8(1) of the Constitution. It is true that the powers given to the Public Prosecutor under section 418A are wide and absolute. These factors however do not by themselves invalidate the section. I agree with the learned Solicitor-General that the court should not adopt a doctrinaire approach in such matters. In other words no rigid principle should be formulated and applied to each and every case. Each case must be considered separately on its merits and in the light of its own particular facts and circumstances. It is thus important also to consider the results which ensue when the Public Prosecutor exercises his powers under section 418A of the Criminal Procedure Code. The position of the accused is not altered to his detriment in the slightest way. The criminal procedure and the rules of evidence remain the same. He loses no benefit whatsoever by the transfer of his case to the High Court and he retains his right of appeal to a superior court. In short the accused is not prejudiced in any way but would get a trial no less fair than he could have hoped for in the subordinate court. By the operation of section 418A the accused does not lose his fundamental liberty of being equal before the law and entitled to the equal protection of the law.

I am aware that recently in the High Court at Kuala Lumpur Abdoolcader J. declared section 418A as null and void for being *ultra vires* the Constitution. I must say that it is with regret that I have to disagree with him and arrive at a different conclusion and rule that section 418A of the Criminal Procedure Code is a good and valid law. In my judgment for the reasons that I have set out above section 418A is not *ultra vires* the Federal Constitution as its provisions do not violate article 8(1) or any other article in the Constitution. Therefore in the present case the Public Prosecutor's certificate requiring the subordinate court to transfer the case to the High Court was issued by the Public Prosecutor in the legitimate exercise of his powers under section 418A of the Criminal Procedure Code and it is incumbent upon the High Court to accept and take cognisance of this transfer. The preliminary objection taken by Mr. Yeap Ghim Guan on behalf of the accused is accordingly dismissed.

Preliminary objection dismissed.

Solicitors: *Yeap & Co.*

PUBLIC PROSECUTOR v. SU LIANG YU

[O.Cr.J. (Hashim Yeop A. Sani J.) August 20, 1976]
[Ipoh — Criminal Trials Nos. 11, 12 and 13 of 1976]

Criminal Law and Procedure — Transfer of case to High Court on certificates issued by Public Prosecutor under s. 418A of the Criminal Procedure Code (F.M.S. Cap. 6) — Whether valid — Whether s. 418A of the Criminal Procedure is in violation of art. 8 of the Federal Constitution — Criminal Procedure Code (F.M.S. Cap. 6), ss. 138, 376(1), 417 & 418A — Federal Constitution, arts. 8 & 145(3).

Legislation — Challenge as offending the guarantee of equality and equal protection of the law — Duty of court.

The Public Prosecutor purporting to exercise his power under section 418A of the Criminal Procedure Code issued a certificate on March 16, 1976 requiring the Sessions Court, Lumut to remove Warrant Case S.C. 21/76 and sixteen other cases involving the same accused then pending before the said Sessions Court to the High Court, Ipoh. In all these cases the accused was charged under section 4(c) of the Prevention of Corruption Act, 1961. The accused challenged the validity of section 418A and the certificate purporting to be issued under it as infringing article 8(1) of the Federal Constitution.

Held: (1) section 418A of the Criminal Procedure Code is a provision procedural in character and the exercise by the Public Prosecutor of his power under that section was not inconsistent with his power conferred by article 145(3) of the Federal Constitution and section 376(i) of the Criminal Procedure Code. The provision of section 138 of the Criminal Procedure Code has removed any prejudicial or hostile effect on any person subject to section 418A;

(2) section 418A of the Criminal Procedure Code was not invalid and the certificate issued by the Public Prosecutor under that section was likewise not invalid.

Cases referred to:—

(1) *Charanjit Lal Chowdhury* v. *Union of India* A.I.R. 1951 S.C. 41.

(2) *Kedar Nath* v. *State of West Bengal* A.I.R. 1953 S.C. 404 at p. 406.

(3) *Snowden* v. *Hughes* 321 U.S. 1.

(4) *Anwar Ali Sarkar's case* A.I.R. 1952 S.C. 75.

(5) *Budhan Choudhry* v. *State of Bihar* A.I.R. 1955 S.C. 191.

(6) *Mohamed Sidin* v. *Public Prosecutor* [1967] 1 M.L.J. 106.

(7) *Bidi Supply Co.* v. *Union of India* A.I.R. 1956 S.C. 479.

(8) *Plessy* v. *Ferguson* 163 U.S. 537.

(9) *Brown* v. *Board of Education* 347 U.S. 483.

(10) *Kathi Raning Rawat's case* [1952] 3 S.C.R. 435.

(11) *M.K. Gopalan & Anor.* v. *State of Madhya Pradesh* [1955] S.C.R. 168.

(12) *Long bin Samat & Ors.* v. *Public Prosecutor* [1974] 2 M.L.J. 152.

(13) *Moti Ram* v. *Union of India* A.I.R. 1966 Him Pra 25 (31, 32).

(14) *The Tata Oil Mills Co. Ltd.* v. *Commr., Ernakulam Municipality* [1964] Ker L.J. 450 (455, 456).

(15) *Sarju Pandey* v. *State* A.I.R. 1956 All 589, 594; [1956] Cr. L.J. 1152 (DB).

(16) *Public Prosecutor* v. *Khong Teng Khen*, Federal Court Special Case No. 1 of 1976, to be reported.

CRIMINAL TRIALS.

Tan Sri Datuk Haji Mohamed Salleh bin Abas (Solicitor-General) (*Datuk Haji Mohamed Eusoff Chin* and *Datuk Haji Abdullah Ngah* with him) for the Public Prosecutor.

Paramjit Singh (*S.I. Rajah* and *K. Chandran* with him) for the accused.